

P.R.I.M.E. Finance

Panel of Recognized International Market Experts in Finance

Views from the Bench: a Judicial Roundtable



Presentation by David Baragwanath (1)
2017 P.R.I.M.E. Finance Annual Conference
23 & 24 January, Peace Palace, The Hague

International Financial Disputes Arbitration and Mediation

Ed Jeffery Golden and Carolyn Lamm (Oxford 2015) p14

- Need for experience to ensure the “right course of action for resolving financial market disputes”
- “a judicial mistake made when interpreting a standard term can ‘infect’ trillions of dollars of trading based on the same term.”



The **1980 Rome Convention** on the law applicable to contractual obligations which includes in its **Uniform Rules Article 3 Freedom of choice**:

3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, **where all the other elements relevant to the situation at the time of the choice are connected with one country only**, prejudice the application of rules of the law at the country which cannot be derogated from by contract, hereinafter called 'mandatory



Sociedade de Desenvolvimento do Norte da Madeira v BST District of the Lisbon Central Court of 14 July 2015 (538/14.2TVLSB):

... the adoption of the standard ISDA model contract is an element – par excellence – of the international nature of the interest rate swap contracts in the proceedings.

Banco Santander Totta SA v Companhia de Carris de Ferro de Lisboa SA [2016] EWHC 465 (Comm), [2016] 4 WLR 49 per Blair J :

404 ... For the purposes of Art. 3(3) of the Rome Convention, in determining whether ... all the other elements relevant to the situation are connected with one country only, the enquiry is not limited to elements that are local to another country, but includes elements that point directly from a purely domestic to an international situation.

(A) In financial transactions, the use of ISDA or other standard documentation used internationally may be relevant, and the fact that the transactions are part of a back-to-back chain involving other countries may also be relevant.



Internationalisation

The formulation by Judge Greenwood, adopted by the International Law Commission Special Rapporteur Sir Michael Wood:

International law is not just a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law.(2)

R v Secretary of State for the Home Department; ex parte Adan [2000] UKHL 67 at p12, [2001] 2 AC 477 per Lord Steyn of multipartite treaties (there the 1951 Refugee Convention):

- In principle... there can be only one true interpretation of [such treaty] ... in practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it.

(2) *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea)* ICJ Judgment 19 June 2012, Declaration of Judge Greenwood para 8, cited by Sir Michael Wood Special Rapporteur *First Report on formation and evidence of customary international law* International Law Commission 17 May 2013 A/CN.4/663 at para 19.



But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty.

And there can only be one true meaning

While the ISDA Master Agreements permit flexibility (see *Lomas v Burlington Loan Management Limited (Waterfall IIC)* [2016] EWHC 2417 (Ch) para 48(4)), that decision emphasises at para 22 that the issues in that case are

“of systemic importance given the widespread use of ISDA Master Agreements, in their various iterations, for over the counter derivative transactions internationally”.



The importance of the initiatives of P.R.I.M.E. Finance

2015 UNCTAD (*United Nations Conference on Trade and Development*) Annual Report emphasizing:

the financing gap for meeting the Sustainable Development Goals (SDGs)

(developing countries faced an annual gap of \$2.5 trillion).(3)

UNCTAD's 2016 Annual Report (4) now warns that:

the regulatory and normative framework on which healthy markets depend, having already warped, is beginning to buckle as the weight of Greenspan's mistake is felt in an ever-widening swathe of economic and social life – from precarious employment conditions to corporate tax inversions to undrinkable tap water. Trust in political leadership is at an all-time low, just when the need for decisive political action is at an all-time high. This is particularly true for a series of interconnected global challenges, codified in the Sustainable Development Goals, which can only be met through effective international cooperation and action.

(3) http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf p128 visited 28 January 2016

(4) http://unctad.org/en/PublicationsLibrary/tdr2016_en.pdf visited 6 October 2016



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Adam Smith *The Theory of Moral Sentiments* Sixth edition 1790;
Cambridge Texts in the History of Philosophy ed Knud Haakonssen
2002) pp216-7 emphasizing:

the extension of trade [as being a] noble and magnificent
object...



Christine Lagarde, Jim Yong Kim and Roberto Azevêdo *The Wall Street Journal* October 4 2016:

Many of the world's economic leaders gathering this week in Washington for the International Monetary Fund/World Bank annual meetings may face discontent back home. Adding to a variety of worries, skepticism over trade has risen, protectionism has increased, trade itself has stagnated, and productivity growth has lagged. Particularly in the advanced economies, growth that has been too low and unequally distributed for too long is eroding support for the open trade policies that are essential for sustained recovery and boosting global growth and equity for years to come.

To avert a downward spiral of low growth and protectionism, we must make trade an engine of growth for all. Through international cooperation we must extend the benefits of openness and economic integration, including to small businesses, in developing countries. We must also mitigate the side effects for those individuals and communities being left behind.

Let's be clear about what's at stake: Trade is not an end in itself, but a tool for better jobs, increased prosperity and reduced global poverty. With open markets, more people benefit from access to goods and services, ideas spread, and firms access larger markets abroad.



The role that P.R.I.M.E. Finance experts and alternative dispute resolution mechanisms can play in assisting litigants and the courts to resolve disputes under financial contracts efficiently and fairly.

Needs:

(1) In principle:

- institutions with relevant expertise
- they apply themselves on a transnational basis and create systems

(2) In structure:

- Legislative: the Master Agreements and the Arbitration and Mediation Rules contribute a vital law-making component;
- Executive: the cross-border vision, international membership, influence, educational role and relationships of P.R.I.M.E. Finance: the Cooperation Agreement with the PCA (PCA administration of cases under the P.R.I.M.E. Finance Arbitration Rules)



- Judicial: arbitral panels' treble combination of experienced judges, arbitrators, and industry experts; regular provision of expert witnesses; training of judges internationally

(3) In practice P.R.I.M.E. Finance contributes:

- cross-border communication among potential colleague institutions and personnel
- judicial training
- provision of expert advice and assistance.



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